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No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1951

WILBUR C. KING, JERRY W. CARTER, AND RICHARD A. MACK, AS AND CONSTITUTING THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

In the Supreme Court of the United States

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Pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment, entered on July 17, 1951, of a specially constituted three-judge United States District Court convened pursuant to 28 U. S. C. 1253, 2284, and 2325, denying a petition to set aside

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an order of the Interstate Commerce Commission. That order directed that certain rates and charges covering intrastate transportation of freight in the State of Florida be raised by the same percentages by which the Commission previously had increased interstate freight rates. Appeal was allowed on September 7, 1951, and appeal papers were served on September 12, 1951.

In 1946 and 1947 the Commission, in a series of proceedings (*Ex Parte 162 and 166,* 266 I. C. C. 537, 269 I. C. C. 33, 270 I. C. C. 81, 93, 403) granted certain over-all general percentage increases in interstate freight rates throughout the country. Pursuant to Section 13 (3) of the Interstate Commerce Act, representatives of the State regulatory commissions sat with and advised the Commission in those proceedings. The Florida State Commission's appearance therein was noted. No appeal was taken from those orders.

The railroads operating in Florida then filed a series of petitions with the Florida Commission to have their intrastate Florida rates raised by the same percentages. The Florida Commission granted some but not all of the increases. The railroads then instituted the present proceeding under Section 13 (4) of the Interstate Commerce Act to have the Commission raise their Florida intrastate rates to eliminate the discrepancies. After extensive hearings, the Commission granted most of the requested increases.

Increases in Florida Intrastate Rates, 278 I. C. C. 41.

Section 13 (4) of the Interstate Commerce Act directs the Commission to fix intrastate rates whenever they cause "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." The Commission, in this case, found that raising the Florida intrastate rates was required to eliminate such discrimination.[1] We submit that its decision is clearly correct, that the findings of the Commission are adequate to support its order, and that this appeal presents no substantial questions justifying further review by this Court.

Appellants' principal contention, rejected by both the Commission and the court below, is that the Commission has no power to increase freight rates generally so as to make up losses from passenger traffic. Concededly, the general increases in interstate freight rates granted in *Ex Parte 162 and 166* reflected passenger revenue

[1] Section 13 (4) also directs the Commission to fix intrastate rates if they cause "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand." The Commission found that the Florida intrastate freight rates did so prejudice interstate commerce and give unreasonable advantage to intrastate commerce. This question was not passed on by the court below, which remarked, citing *Florida* v. *United States*, 282 U. S. 194, that it was "doubtful whether the Commission's order could be sustained on this ground."

deficits. We submit that the Commission clearly had the power to take this factor into account in fixing freight rates. "As to interstate regulation, the Commission is granted the broadest powers to prescribe rates * * *" *North Carolina* v. *United States,* 325 U. S. 507, 510.

The National Transportation Policy, enunciated by Congress as the Commission's guide to the public interest,[2] indicates that the Commission's obligations to "promote safe, adequate, economical, and efficient service," to "foster sound economic conditions in transportation and among the several carriers," and to insure "reasonable charges for transportation service," contemplates the greatest flexibility in rate regulation. Nor is any limitation on the Commission's power in this regard suggested by the Interstate Commerce Act itself. Section 15a delineates in the broadest terms the Commission's responsibilities in prescribing "just and reasonable rates" for the transportation of "passengers or property" (Section 1 (5)). The Commission is directed to give "due consideration" to the carriers' need for revenues sufficient to provide "adequate and efficient railway transportation service."

The courts, in determining the Commission's powers have recognized the Commission's duty

[2] See *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82.

to balance the competing interests involved and to maintain an adequate national transportation system. Thus, this Court has held that the Commission's determination under Section 1 (18)–(20) of whether a particular railway line is to be abandoned is to be made "upon a balancing of the respective interests" of the localities on the line proposed to be abandoned and of the carrier itself. *Colorado* v. *United States,* 271 U. S. 153, 168–169. Abandonment will not be authorized merely because the particular line is unprofitable, "the effort being to decide what fairness to all concerned demands." *Ibid;* cf. *Alabama Public Service Commission* v. *Southern Railway Company,* 341 U. S. 341, 347, and see concurring opinion pp. 352–355. And almost 30 years ago, in the *New England Divisions Case,* 261 U. S. 184, this Court upheld the Commission's power, in making a just division of joint rates under Section 15 (6), to consider the financial needs of a weak road and to give it a share of a joint return larger than its contribution to revenues as between the parties would suggest, in order to maintain it in effective operation as part of an adequate public transportation system.

We submit that the development, coordination, and preservation of a national transportation system adequate to meet the Nation's commercial, postal, and military needs clearly requires ade-

quate passenger service.[3] If such service cannot be provided without raising freight rates, the Commission has the power to make the appropriate increases.[4]

Section 13 (4) of the Act authorizes the Commission "to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate." *United States* v. *Louisiana*, 290 U. S. 70, 75; *Florida* v. *United States*, 292 U. S. 1, 5. In other words, interstate commerce is discriminated against when intrastate commerce fails to bear its proper share of the total revenue requirements of the carriers needed for efficient operation. If increases in interstate freight rates may be made on the basis of the over-all needs of the carriers—

[3] As the Commission itself has pointed out: "Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations." *Increased Freight Rates, 1948*, 276 I. C. C. 9, 35.

[4] The Commission cases cited by appellants purportedly showing that the Commission has required each branch of service to "pay its way" reflect an earlier policy long since abandoned. In recent years the Commission has treated the revenue requirements of the railroads in terms of their over-all operations, and has not denied increases to one category of service because they were needed to offset losses incurred the other. See *Increased Freight Rates, 1948*, 276 I. C. C. 9, 32-35.

including needs resulting from deficits in passenger operations—intrastate freight rates may be adjusted so that intrastate freight bears its fair share of the increased burden.

The Commission found here that the intrastate rates were not contributing their fair share of the revenues required by the carriers to render "adequate and efficient service" and to "operate profitably." Such findings, supported by substantial evidence (as the lower court found), sustain the Commission's order (*North Carolina* v. *United States,* 325 U. S. 507, 514), and will not be reexamined by this Court. *Florida* v. *United States,* 292 U. S. 1, 12. Appellants' argument that the Commission cannot consider passenger deficits in fixing intrastate freight rates would nullify the Congressional policy of eliminating intrastate rate discriminations against interstate commerce. To whatever extent the Commission is denied the power to make intrastate commerce bear its fair share of the carrier's total revenue requirements, the burden on interstate commerce and the resulting discrimination are correspondingly increased.

Appellants also contend that the Commission's order is defective for failing to find the total revenues required by the carriers, and what contribution intrastate commerce should make thereto. This argument apparently rests upon a misconception of the holding in *North Carolina* v.

United States, supra. The Court there vacated a Commission order raising North Carolina intrastate passenger fares to the level previously fixed for interstate travel because "not based on adequate findings." It held that a mere discrepancy between intrastate and interstate rates did not of itself constitute discrimination against interstate commerce. In reaching this conclusion the Court noted that there was considerable evidence from which the Commission might have found that the intrastate rates constituted a fair contribution to the carriers' total revenue requirements, but that "it made no findings on this subject at all." The Court pointed out that the railroads concerned "were more prosperous than they had been in their history," and were in the highest excess profit tax bracket.

We submit that the Commission's findings in the instant case meet the requirements laid down in the *North Carolina* case. Contrary to appellants' contention, there is a great deal more in the record than a mere disparity of rates to support the Commission's order. The Commission found that: (1) the intrastate rates were "abnormally low" and were "not contributing their fair share to the revenues required" by the carriers "to enable them to render adequate and efficient service and to operate profitably" (Fdg. 5). (2) The increased intrastate rates "will not exceed a just and reasonable level" (Fdg. 3)

and "will constitute not more than a fair proportion of respondents' [the carriers'] total income" (Fdg. 6). (3) Maintenance of the lower intrastate rates will cause "in all instances, unjust discrimination against interstate commerce" (Fdg. 7 (1)). The carriers' 1948 average rate of return of 2.29 percent before and 2.91 percent after depreciation hardly reflects unbounded prosperity. To the contrary, the Commission concluded that the carriers needed the additional $915,325 intrastate revenues to "operate profitably."

If appellants are contending that the Commission must make precise dollar findings,[5] they are demanding an "impracticable exactness" instead of the "reasonable determinations" that the realities of the situation call for. *Florida* v. *United States*, 292 U. S. 1, 9. We submit that the Commission's findings, read in conjunction with its report, cf. *United States* v. *Louisiana*, 290 U. S. 70, 80, fully meet the standards promulgated in *North Carolina* v. *United States*.

It is one of the unfortunate facts of railroad life that for many years passenger operations have been unable to "pay their way," and that

[5] The carriers found it "impractical" to produce separate figures at the hearings segregating revenues, operating costs and property values as between interstate and intrastate traffic, and the Commission stated that they "would serve no useful purpose." 278 I. C. C. 66. Cf. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483.

freight rates have had to absorb the deficit.[6] Cf. *Increased Freight Rates, 1948*, 276 I. C. C. 9, 32–40. If intrastate freight rates do not assume their fair share of this passenger deficit, interstate freight rates will have to bear the entire burden, including that created by intrastate passenger deficits.[7] Thus, denial of the Commission's power to make appropriate increases in intrastate freight rates would make further interstate increases inevitable, thereby intensifying the discrimination against interstate commerce.

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

(s) Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

(s) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

SEPTEMBER 1951.

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[6] The aggregate deficit from passenger operations of Class I railroads in the United States in 1949 was approximately $643,000.00. *64th Annual Report of the Interstate Commerce Commission* 5.

[7] The Commission concluded (278 I. C. C. 68): "There is here no claim or showing that the passenger deficits of the respondents do not result from intrastate as well as interstate operations, and the passenger deficit of the East Coast, which operates entirely within Florida, would appear to indicate to the contrary."

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